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87-653

No. 87-635

Supreme Court, U.S.

FILED

DEC 10 1987

JOSEPH E. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

GOVERNMENT OF THE VIRGIN ISLANDS,
Petitioner,
v.

JDS REALTY CORPORATION,
formerly known as West Indies Corporation,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR THE GOVERNMENT OF GUAM,
EX REL. ELIZABETH BARRETT-ANDERSON,
ATTORNEY GENERAL OF GUAM
AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, absent an express Congressional application, the Commerce Clause of the United States Constitution limits legislation enacted by the unincorporated territory of the United States Virgin Islands.

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INTEREST OF THE GOVERNMENT OF GUAM

Amicus respectfully files this brief in support of the Petition for a Writ of Certiorari filed by the Petitioner, the Government of the Virgin Islands. Both Petitioner and Respondent have given their consent to the filing of this Brief.

The Government of Guam possesses the same status as the petitioner, Government of the Virgin Islands, in that

both governments are created by Congress as the governments of the only two unincorporated territories of the United States (48 U.S.C. § 1421a and 48 U.S.C. § 1541 (a), respectively). Both Guam and the Virgin Islands are insular areas and have similar needs to control their own economies.

Further, the Ninth Circuit Court of Appeals has held that the "negative implications" of the Commerce Clause of the U.S. Constitution do not apply. *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1457 (1986). If the decision in this case were to be applied to Guam, Guam would be seriously inhibited in its ability to conduct its own economy, distant as it is from the United States mainland.

ARGUMENT

I. CONGRESS HAS ALREADY SPOKEN ON THE TREATMENT OF THE TERRITORIES UNDER THE "COMMERCE CLAUSE"

While all Circuits except the Third Circuit have held that the "negative implications" of the Commerce Clause of the Constitution (U.S. Const. art. I, sec. 8, cl. 3) do not apply to unincorporated territories, (Petition, pp. 10-12), Congress has determined that unincorporated territories should be treated, as far as commerce is concerned, as a special class of foreign nations, rather than as parts of the union.

Concerning trade coming into the United States customs territory from "insular possessions," of which the Virgin Islands is one, customs duties are imposed by the United States. An examination of the appropriate statutes shows that insular possessions are a subcategory of foreign countries. (See 19 U.S.C. § 1202, General Headnote 3(a), as amended.) Rules for importation of goods from insular possessions are found in the same headnote

as are rules for foreign nations receiving preferences for their goods. (See 19 U.S.C.A. § 1202, General Headnote 3(c) (West 1977) as an example.)

In the case of the Virgin Islands, Congress has specifically held that the Virgin Islands may "impose on the importation of any article into the Virgin Islands for consumption therein a customs duty." (48 U.S.C. § 1574(f).) Congress has specifically empowered the U.S. Postal Service to assist the Virgin Islands in collecting an excise tax. (Pet. p. 15, n.8.)

No state is treated in such a manner. Indeed, the power to restrict trade from unincorporated territories was a foundation of the "unincorporated" doctrine separating unincorporated territories from incorporated territories and states. (See "Insular Cases," cited in Pet. p. 14; see especially *Downes v. Bidwell*, 182 U.S. 244 (1901).) Congress may not impose duties on goods entering one state which are different from those imposed upon goods entering another state. (U.S. Const. art. I, sec. 8, cl. 1.) States are prohibited from requiring vessels engaged in interstate commerce from entering, clearing or paying duties in another state. (U.S. Const. art. I, sec. 9, cl. 6.) States are strictly limited in their ability to lay "imposts or duties" upon goods coming into that state. (U.S. Const. art. I, sec. 10, cl. 2.)

Because of Congress' consistent treatment of unincorporated territories as outside of the Union, and outside of the customs territory of the United States, the courts should not apply their own restrictions to the unincorporated territories which are inconsistent with being outside of the United States. Rather, the territories should be able to exercise such powers as have been given them consistent with their quasi-foreign status via-a-vis the United States and not be restricted to the standards of a state, which is within the United States' customs union.

II. THE COURTS SHOULD VIEW THE CREATION OF TERRITORIES AS A CONSISTENT PLAN OF CONGRESS, NOT AS BIT-BY-BIT DELEGATIONS OF POWER

The court below erred in comparing the Virgin Islands, an unincorporated territory, with a state. This Court has stated that:

It would be absurd to hold that the territories, which are much less independent than the states, and are under the direct control and tutelage of the general government, possess a power in this particular which is thus expressly forbidden to the states. *Downes v. Bidwell*, 182 U.S. 244, 263 (1901).

The concept embodied in this statement has been extended too far by the court below. This Court, in *Downes*, was referring to a power held by the United States vis-a-vis foreign powers. In such a connection, the "United States" includes all of its entities, states and territories alike. *Downes*, 182 U.S. at 263.

In this case, the court below was considering the Constitution only as it relates to powers of the United States over its internal commercial union. (Pet. App. p. 6a.) So, the issue of presenting a united country as against foreign powers is not at issue. There is no reason to use such logic when comparing a territory against a state, or even against the union of states, when the territory is outside of that union. Only if that territory were inside that union, as Puerto Rico is now within the customs territory of the United States, does that argument make sense. (48 U.S.C. §§ 438, 439.)

Again, the court below is mistaken when it requires a specific act of Congress in order to carve out an exception to State constitutional doctrines in territories. As shown in amicus' first argument, Congress has seen fit to place the Virgin Islands outside the customs territory and commercial union of the United States. Since Con-

gress has placed the Virgin Islands outside of that very union which the Commerce Clause was intended to protect, the reasons for the "negative implications" of the Commerce Clause do not apply. The courts should not be looking for reasons to apply State standards to unincorporated territories when Congress has placed those territories in a class of entities clearly outside the ambit of those standards (Commerce Clause "negative implications").

The Virgin Islands should be permitted to exercise, within the limits of its own Organic Act and applicable laws of the United States, such powers of taxation as it deems wise for its own circumstances, even though a state could not exercise the same powers.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 9, 1987